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# Articles

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Mary Jane Mossman\*

"Running Hard to Stand Still": The  
Paradox of Family Law Reform

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## I. *Introduction: The Paradox of Law Reform*

This essay explores the paradox of family law reform in common law Canada, focusing particularly on reforms relating to family property and inter-spousal support in the decades after the first federal *Divorce Act* of 1968. The paradox of this law reform activity is well-expressed in Carol Smart's colourful phrase about the (lack of) impact of law reform for women in the United Kingdom. In her view, while it is inaccurate to say that nothing has been done to improve the position of women, it is equally impossible to demonstrate that there has been any linear development of progressive legislation; in such a context, Smart suggested that women have been "running hard to stand still."<sup>1</sup>

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This paper is part of a larger project on family law reform processes in Canada. The focus here on post-divorce economic relationships between married spouses is only part of the larger problem of post-separation economic issues in many kinds of "family" relationships.

1. C. Smart, "Feminism and Law: Some Problems of Analysis and Strategy" (1986) 14 *Int. J. Sociol. Law* 109 at 116. The idea of "running hard to stand still" was also used by Dorothy Chunn and Joan Brockman in their analysis of gender bias in the legal system; see D. Chunn & J. Brockman, "'Running Hard to Stand Still?'—Future Directions for Studying 'Gender Bias' in Law" in J. Brockman & D. Chunn, eds., *Investigating Gender Bias: Law, Courts and the Legal Profession* (Toronto: Thompson Educational Publishing, 1993) 215.

The idea that women (and children) are “running hard to stand still” in the family law context suggests a need to focus careful attention on family law reforms concerning property and inter-spousal support, reforms which appear to have been designed to transform economic relationships on marriage breakdown. From the law reform perspective, the past two decades have witnessed an unprecedented flurry of reform activity about issues of property and inter-spousal support: law reform commission reports, federal and provincial legislative action,<sup>2</sup> and significant judicial decisions in both provincial appellate courts and in the Supreme Court of Canada. Yet, in spite of so much law reform activity, we are confronted, paradoxically, by a deluge of unremittingly tragic statistics about current levels of poverty for women and children in Canada, poverty which has been traced in part to marriage breakdown. According to the author of a 1992 report, for example:

the end of a marriage or common-law relationship increased the likelihood of poverty substantially. For those who were married and had children, the risk of poverty rose from 3.1 per cent to 37.6 per cent after divorce or separation. . . . In 1982–86, the family income of women (adjusted for changes in family size) dropped by an average of about 30 per cent in the year after their marriage ended. In contrast, the family income of divorced or separated men rose by an average of 12 per cent.<sup>3</sup>

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2. Following the enactment of comprehensive reform legislation concerning divorce in 1968 (the *Divorce Act*, R.S.C. 1970, c. D-8), the federal law reform commission engaged in a project on family law reform, as did a number of provincial law reform commissions. See Law Reform Commission of Canada, *Studies on Family Property Law* (Ottawa: Information Canada, 1975). By 1980, all nine common law provinces had enacted new legislation about property and spousal support on marriage breakdown, and a number had also reformed custody and access arrangements. A few years later, there was a “second wave” of family law reform initiatives, when the federal government repealed and replaced the 1968 divorce legislation with the *Divorce Act*, 1985, S.C. 1986, c. 4, legislation which included new provisions relating to inter-spousal support. In the same year, Ontario repealed its 1978 legislation about property and support, replacing it with the *Family Law Act*, R.S.O. 1990, c. F-3. In 1989, British Columbia produced a law reform commission report recommending revisions to its property legislation similar to those in existence in Ontario; see Law Reform Commission of British Columbia, *Working Paper on Property Rights on Marriage Breakdown* (Vancouver: The Commission, 1989). Both the federal government and provincial governments have also enacted legislation concerning the enforcement of support and custody orders, and Ontario recently amended its enforcement legislation; see now *Family Support Plan Act*, 1991, R.S.O. 1990, c. S-28.

3. T. Lempriere, “A New Look at Poverty” (1992) 16 PCPT 18 at 19–20. These Canadian statistics reflect similar, though less dramatic, income fluctuations for men and women at marriage breakdown to those reported in L. Weitzman, *The Divorce Revolution* (New York: Free Press, 1985). According to Weitzman’s research in California, men’s income in the year after divorce rose on average 73 per cent, while women’s income in the same period declined on average by 42 per cent. For further analysis of the economic impact of marriage breakdown on women in Canada, see M.J. Mossman & M. MacLean, “Family Law and Social Welfare: Toward a New Equality” (1985) 5 Can. J. Fam. L. 79; and M. McCall, J. Hornick & J. Wallace, *The Process and Economic Consequences of Marriage Breakdown* (Calgary: Canadian Research Institute for Law and the Family, 1988).

The paradox of so much law reform activity relating to property and inter-spousal support after marriage breakdown, in conjunction with significant levels of poverty for women and children in these circumstances, raises profound questions about law reform processes, both for lawyers and others who regard law as a strategy for accomplishing social change. Put another way, we need to ask whether we can really claim that there has been "reform" of family law if "reform" means, as the dictionary suggests, "improvement or change for the better"; or whether there has been legal change, but not necessarily law "reform." Undoubtedly, the late Horace Read's interest in law reform centred on reform as "improvement" or "progress." Thus, in the context of this lecture in his honour, I want to explore the real accomplishments of family law reform in Canada in recent decades and to confront the question, from the perspective of women and children, about whether we should regard it as "reform"; or whether, on the other hand, it has merely resulted in some inconsequential changes so that women and children are left "running hard to stand still."

This question about the efficacy of law reform for women and children builds on feminist analyses about engagement with law. For feminists and others who want to use law to accomplish change, especially fundamental change, law reform efforts have often led to frustration. Feminist reformers in particular have offered trenchant critiques of law's "uneven development," suggesting that it both "facilitates change and is an obstacle to change."<sup>4</sup> In such a context, Audre Lorde's criticism that "the master's tools will never dismantle the master's house"<sup>5</sup> seems entirely apt. Other critics, agreeing with feminist reformers that law is relatively powerless to effect fundamental change, have suggested that because law is both constructed by and reflective of social relations, and situated within society rather than an autonomous and abstracted entity

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4. See Smart, *supra* note 1 at 117. For similar analyses, see J. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 Int'l J. Sociology L. 445; M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" (1986) 3 Aust. J.L. & Soc. 30; and C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989).

5. Lorde continued: "They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change" (as quoted in M. Thornton, "Feminism and the Contradictions of Law Reform" (1991) 19 Int'l J. Sociology L. 453).

outside social relations, it is inevitably "shaped by [social] forces . . . to a far greater extent than it can shape them."<sup>6</sup>

Yet, in spite of accepting the strength of these criticisms, other scholars have concluded that engagement with law reform processes is nonetheless necessary. For example, Margaret Thornton has argued that:

In light of the privileged status of law within our society, it cannot be neglected or social relations will continue to be reproduced within legal discourse as they always have been. . . .<sup>7</sup>

Thornton has analyzed in detail the problems of liberal legal discourse, its promises and limits, but argued nonetheless that informed engagement with it remains necessary.<sup>8</sup> In the context of this essay about the paradox of family law reform, I have similarly tried to avoid the more sweeping claims of this debate about the role of law in accomplishing change. Instead of concluding that law reform is *never* useful, or, by contrast, that it offers a panacea for social problems, my objective here is to understand how the law reform process has occurred in the family law context so that problems can be identified, if not immediately eliminated. While such an assessment may result in conclusions which are somewhat tentative and ambiguous, it seems nonetheless essential to strategic decision-making about family law reform for the future.

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6. See R. Cotterrell, *The Sociology of Law* (London: Butterworths, 1984) at 70–71. Cotterrell has also suggested that failure to understand law as just "one tool of directed social change" could lead to "inevitable disillusionment when the legal instrument fails to achieve what the legal reformer intended." For a similar analysis in the Australian context, see A. Ziegart, "The Limits of Family Law: A Socio-Legal Assessment" (1984) 9 Leg. Serv. Bull. 257. As Ziegart has argued (*ibid.* at 257–58):

It is worthwhile to be reminded of [the] congruence of social structures which the law shares with society at large when looking at social change through law, rather than assuming a special instrumental quality of the law which sets it apart from the social system in which it operates.

Yet, although Ziegart concluded that law does not lend itself to an instrumental use for social change, he nonetheless conceded (*ibid.* at 263) that "without the law, social change would not be feasible."

7. Thornton, *supra* note 5 at 454. See also N. Lacey, "Feminist Legal Theory" (1989) 9 Oxford J. Legal Stud. 383 at 385:

[A]ll feminist scholars with an interest in law start out from the assumption that law has an important, albeit not decisive, influence in constructing and maintaining social relations. Thus most feminist legal scholars believe, though to very different degrees, that law plays some part in consolidating, expressing, underpinning and supporting existing power relations in societies, including those between women and men.

8. M. Thornton, *The Liberal Promise* (New York: Oxford University Press, 1990). According to Thornton, even though "legislation can practically deal with only the more excessive manifestations of social power exercised over subordinates" and "in spite of its inability to fulfil the unrealistic expectations that it transform our society, . . . [human rights] legislation does serve an important symbolic and educative function" (*ibid.* at 261).

## II. *Themes in Family Law Reform: Exploring the Paradox*

A comprehensive review of family law reform in common law Canada in the past two decades represents a complex research inquiry.<sup>9</sup> It might well encompass a review of legislative actions and judicial decisions from across the country, as well as the work of law reform commissions, governmental inquiries and studies, and the briefs and submissions which form part of legislative inquiries. Such an inquiry might also need to include empirical research about the impact of applying current legal principles to families involved in divorce, and measuring over a period of time thereafter the continuing economic impact of the application of legal rules.<sup>10</sup>

In addition, because this issue of family law reform has been the focus of reform activity in other common law jurisdictions, it is useful to assess the research activity and reform proposals in the United States, Australia, and the United Kingdom. Interesting comparisons may also be made with civil law jurisdictions in North America and in Western Europe. Indeed, a current project about family law reform in the European Community has focused on comparisons between France and the United Kingdom (and other countries) so that, as one important factor for comparison, the research can try to assess the impact of common law principles and those of the civil law on family law reform proposals.<sup>11</sup> Moreover, research about property and inter-spousal support may also need to take account of related issues such as child support, custody and access, and child support guidelines, all of which are linked to property and inter-spousal support as different manifestations of economic issues at marriage breakdown.<sup>12</sup>

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9. Some of the issues noted here have been addressed in my earlier reviews of family law reform activities: for example, in relation to the United Kingdom and Australia, see M.J. Mossman, Book Review of *Maintenance After Divorce* by J. Eekelaar & M. Maclean (1989-90) 3 C.J.W.L. 293; in relation to the United States, see M.J. Mossman, Book Review of *The Divorce Revolution* by L. Weitzman (1986) 5 Can. J. Fam. L. 341; M.J. Mossman, Book Review of *Abortion and Divorce in Western Law* by M.A. Glendon (1989-90) 3 C.J.W.L. 650; and in relation to Canada, see M.J. Mossman, "Re-Thinking the Feminization of Poverty" (1990) 11:2 *Jurifemme* 7.

10. The most comprehensive study of this kind was conducted by the Institute of Family Studies in Melbourne, Australia. See P. McDonald, ed., *Settling Up: Property and Income Distribution on Divorce in Australia* (Sydney: Prentice-Hall of Australia, 1986) [hereinafter *Settling Up*].

11. See N. Lefaucheur, "Qui doit nourrir l'enfant?" (Paris: Travaux de Recherche et d'Analyse sur le Social et la Sociabilité, 1993).

12. See E. Zweibel & R. Shillington, *Child Support Policy: Income Tax Treatment and Child Support Guidelines* (Toronto: Policy Research Centre on Children, Youth and Families, 1992); and D. Pask, "The Effect on Maintenance of Custody Sharing" (1989) 3 C.J.W.L. 155.

These issues are all important to an assessment of the paradox of family law reform in Canada. Yet, if we are to confront the central issue, the paradox of family law reform, we must delve underneath these issues to examine the fundamental nature of law reform processes. In the context of this lecture, I want to explore three aspects of law reform that have profoundly shaped family law developments about property and inter-spousal support, and that have also contributed to the paradox of family law reform: (a) the constraints of the status quo, inherent in law reform activities; (b) the significance of equality jurisprudence in the family law context; and (c) the impact of the conceptual division of public and private spheres in family law. In my view, these three themes must be explored if we are to seriously confront the paradox of family law reform: that after so much law reform activity, women and children at marriage breakdown are nonetheless “running hard to stand still.”

### 1. *The constraints of the status quo on law reform activities*

Because law reform processes usually occur within an existing legal context and build on existing ideas, they more often promote incremental rather than fundamental change. Law reform activity inherently confines the extent of change and tends to reinforce the status quo. It is now clear that, by making divorce (and remarriage) significantly more accessible, the divorce legislation of 1968 created a new ethos about family dissolution and re-formation in Canada. However, law reform processes have not really confronted the concomitant need for legal principles which (re)arrange economic relationships so as to take account of a newly-emerging pattern of “serial monogamy” in family life. The challenge to do so is an extensive one, both for legal imagination and also for political will. Yet, precisely because of the extent of the challenge, incremental law reform processes may be less able to respond effectively. Thus, any such assessment of the law reform process requires an examination of the relationships among legal institutions and an appreciation of the institutional forces which constrain some of them from more fundamental decision-making. It is also important to examine the ways in which institutional practices may encourage some voices, while limiting others, in the family law context.

An example from the history of family property in the eighteenth and nineteenth centuries shows the ways in which judicial principles were interpreted so as to limit, rather than extend, women’s rights to property, and the further limitations imposed by subsequent judicial interpretation of (arguably fundamental) reform legislation. Thus, the nineteenth century common law principle of the unity of husband and wife, a principle

that precluded women from property ownership after marriage,<sup>13</sup> was moderated in practice by judicial recognition of the equitable family settlement. Equitable family settlements were generally recognized by the courts so that wives could enjoy the beneficial interest in property, so long as there was an express trust agreement.<sup>14</sup> In this way, courts seemed to be receptive to extending property rights to married women.

Yet these reform efforts were also inevitably constrained by the judicial context in which they operated. On closer examination, it is clear that an equitable property settlement enforced by a court operated quite consistently with the common law principle of unity of husband and wife in marriage; it did not confront the existing principle or challenge it directly. As Norma Basch has described it, "equity merely carved out exceptions; it did not overturn the basic common law model."<sup>15</sup> Thus the equitable reform was shaped within and by the common law principles: "A married woman with separate property in equity did not have the same proprietary status as a man or an unmarried woman. Rather, she enjoyed a special status, having rights with respect to certain property only."<sup>16</sup> Moreover, a second limiting principle of the equitable property settlement reforms is evident from the context of judicial decision-making in such cases. Because litigation was often expensive, it seems clear that only relatively wealthy women had access to legal expertise to create such settlements and, if necessary, to defend their rights pursuant to them in court actions. Thus, the application of the benefit of equitable reforms was limited to those with relatively greater access to financial resources.<sup>17</sup> In the more general context of family law reform, the limited access of less wealthy persons to courts may mean that principles are established

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13. For an excellent account of "coverture," see M.E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (Columbia, S.C.: University of South Carolina Press, 1993).

14. See L. Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983).

15. N. Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York* (Ithaca: Cornell University Press, 1982) at 230.

16. According to Holcombe, this comment regarded women as in a somewhat privileged position, continuing thus: "and she escaped some of the liabilities attaching to property generally. As one lawyer expressed it, 'married women . . . are allowed in Chancery the benefit, without the responsibility, of property'" (Holcombe, *supra* note 14 at 44-45 quoting from U.K., H.C., "Special Report from the Select Committee on the Married Women's Property Bill" No. 441 in *Sessional Papers* (1867-68) vol. 7, 6, 9).

17. According to one estimate, "marriage settlements in equity applied to only one-tenth of the marriages in [England]"; see Holcombe, *supra* note 14 at 46, quoting "Married Women and Their Property" 41 *Spectator* 488 at 488 and U.K., H.L., *Parliamentary Debates*, 3d. ser., vol. 142, col. 401 at col. 410 (1856). Despite the low proportion of marriages overall which adopted the equitable settlement arrangement, the figure of ten percent suggests that the settlement was used quite frequently by the most wealthy married couples in England.



in the context of well-to-do family units, but that their utility for poorer families may be much less apparent.

This criticism of judicial principles may seem a familiar one about the class bias of legal processes in general. Nevertheless, it needs to be addressed particularly closely in the context of the substantial amount of family law reform in Canada in recent decades, reform which may have actually exacerbated the poverty of women and children.<sup>18</sup> To what extent may the courts' (some courts?) lack of experience with families who are poor contribute to the acceptance of legal principles which have singularly failed to take into account in any meaningful way the needs and circumstances of less wealthy families?

As the historical example shows, however, legislative changes also do not occur in a vacuum. There is now substantial evidence that the statutes enacted in North American jurisdictions in the late nineteenth century concerning property rights for married women took as their starting point the then current legal and equitable principles. Moreover, there is also growing support for the view that legislation was enacted most often for the purpose of strengthening economic stability for families with property in the face of financial difficulties and uncertainty, *not* so as to challenge societal conventions by advancing the status of women. According to Basch, the reform statutes were generally quite conservative, meeting "limited feminist goals" while functioning as "significant instruments of social stability by making some accommodations for women without significantly overturning the pyramid of male power."<sup>19</sup> There

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18. For critiques about access to justice, particularly for disadvantaged persons (including women), see M.J. Mossman (with H. Ritchie), "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship 1977-1987" in A. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) 53; M.J. Mossman, "'Shoulder to Shoulder': Gender and Access to Justice" (1990) 10 Windsor Y.B. Access Just. 351; and M.J. Mossman, "Gender Equality and Legal Aid Services" (1993) 15 Sydney L. Rev. 30.

19. Basch, *supra* note 15 at 227. According to Basch, there were three motivations for the enactment of the statutes about married women's property in New York. One was the need to accommodate structural changes in the economy within the legal system, creating clear and unambiguous legal rights for married women (rather than the uncertain patchwork developed in equity) so as to encourage and support the burgeoning commercial interests in the state. A second motivation was political, the need to extend to the wives of middle class professionals the benefits of equitable arrangements previously restricted to those who were very wealthy. The third motivation was "the woman question," but Basch has argued persuasively that this factor alone would not have achieved this legislated legal reform. The recent biographical studies of two of the major proponents of married women's property reform (and suffrage) in New York (and beyond) confirm the difficulty experienced by women seeking reform of married women's property. See K. Barry, *Susan B. Anthony: A Biography of a Singular Feminist* (New York: New York University Press, 1988); and E. Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton* (New York: Oxford University Press, 1985).

have been similar conclusions about Canadian provincial legislative reforms concerning married women's property.<sup>20</sup>

In addition to the limiting scope of statutory reforms, it is also important to note the impact of judicial interpretation in achieving (or not achieving) legislative purposes. In the historical context, it seems that judges most often used the principles of common law and equity as the starting point for their analysis of legislative reforms, confining the scope of intended reforms accordingly.<sup>21</sup> Thus, even when legislation arguably departs fundamentally from existing legal principles, its interpretation by courts may constrain the extent to which reform goals will be achieved. Such a process confirms that the starting point for analysis in both courts and legislatures is often the status quo; and that even when proposed changes may have been designed to accomplish substantive or fundamental reforms, legislation may be interpreted within existing paradigms which ensure continuity rather than fundamental change.

These ideas about inherent limits in the law reform process are also revealed in the more recent family law reform context after 1968. Arguably, the most important catalyst for legislative change concerning family property was the decision of the Supreme Court of Canada in 1973 in *Murdoch v. Murdoch*.<sup>22</sup> Irene Murdoch separated from her husband in 1968 after 25 years of marriage, claiming both spousal support and also a declaration that her husband, who held title to all the family property, was a trustee for her of an undivided one-half interest on the basis that they were equal partners. At trial, the court concluded that the indicia of partnership were missing, and awarded her monthly financial support. Her appeal to the Alberta Court of Appeal was denied.<sup>23</sup> In the Supreme Court of Canada, her appeal was based on the doctrine of resulting trust rather than partnership, and the majority of the court concluded that the doctrine could not apply because Irene Murdoch was unable to show that

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20. See C. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 Law & Hist. Rev. 211.

21. See Basch, *supra* note 15 at 230: "The evidence found in treatises, legislative debates and appellate cases suggests that . . . the old common law fiction of marital unity inhibited the reform of marital property law." See also Backhouse, *supra* note 20.

22. [1975] 1 S.C.R. 423 [hereinafter *Murdoch*].

23. The appeal court held that she could not succeed in her property claim because she has been accepting the monthly support payments in the interim, concluding that "the real adjudication in respect of [support] was inextricably related to and dependant upon the fact that there was to be no division of the property"; thus, having taken advantage of the decision at trial, she could not succeed on appeal. While such principles are frequently applied by courts to achieve fairness between parties, their application in the family law context clearly disadvantages the spouse without alternative means of support, and especially (and ironically) where a spouse is challenging the correctness of a trial decision.

she and her husband had adopted a "common intention" that property accumulated during the marriage was to be jointly shared.<sup>24</sup>

In his majority judgment, however, Mr. Justice Martland also reiterated the trial judge's conclusion that the work done by Irene Murdoch during the twenty-five years of her marriage was merely the "work done by any ranch wife."<sup>25</sup> It was this statement, coupled with the denial of her claim to any interest in the property which, in retrospect, seems to have been the major catalyst for legislative reform. As the *Toronto Star* noted in an editorial at the time, the decision of the Supreme Court of Canada represented both "a warning to women and a cue to legislators." Citing recommendations of the Royal Commission on the Status of Women, the editorial suggested that law reform was obviously needed to prevent other "Irene Murdochs [from being] left out in the cold with less than \$60 a week to show for a quarter-century of labour."<sup>26</sup> This sense of injustice was also subsequently reflected in the analysis and recommendations of the federal Law Reform Commission in its study of family property in

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24. At the time of the *Murdoch* decision in the Supreme Court of Canada, there were numerous and somewhat conflicting judgments in both Canada and the United Kingdom about the application of the doctrine of resulting trust to family situations. In *Thompson v. Thompson*, [1961] 1 S.C.R. 3 at 13-14, for example, the Supreme Court of Canada had clearly stated its view that "no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home." In *Murdoch*, the majority also distinguished the few cases in which a non-financial, but nonetheless valuable, contribution had been made by spouses to the acquisition of property because the claims of the non-titled spouse in those cases were directed only to interests in the matrimonial home. By contrast, Irene Murdoch's claim was directed to all the property accumulated during the marriage. For other approaches to the issue, see *Trueman v. Trueman* (1971), 18 D.L.R. (3d) 109 (Alta. C.A.); *Gissing v. Gissing*, [1970] 2 All E.R. 780 (H.L.); and *Pettit v. Pettit*, [1969] 2 All E.R. 385 (H.L.).

25. The work consisted of: "Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked with him, *just as a man would*, anything that was to be done" (*Murdoch*, *supra* note 22 at 360 [emphasis added]). For an analysis of *Murdoch* and later cases, see J. McCamus & L. Taman, "Rathwell v. Rathwell: Matrimonial Property, Resulting and Constructive Trusts" (1978) 16 Osgoode Hall L.J. 741.

26. I acknowledge the excellent help provided by Jeremy Webber in locating this media material about the *Murdoch* decision. See also *The Globe and Mail* which suggested that \$200 per month was "not much for a lifetime of work," and *Chatelaine* magazine which claimed in January 1974 that the *Murdoch* decision was a chilling warning for women that "the Supreme Court protects males but not females."

The reference is to Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) (Chair: Florence Bird) [hereinafter *Report*]. The *Report* recommended that the law should recognize the "concept of equal partnership in marriage" in terms of property entitlement. For further analysis of the *Report* from the perspective of the 1990's, see E. Abner, M.J. Mossman & E. Pickett, "No More than Simple Justice: Assessing the Royal Commission Report on Women, Poverty and the Family" (1990) 22 Ottawa L. Rev. 573.

1975. Acknowledging the importance of the *Murdoch* case in creating a climate for reform of family property principles, the report declared that it was necessary to devise a property regime which would "promote equality of the sexes before the law."<sup>27</sup> Thus, with the support of "public opinion" and law reform commissions (provincial as well as federal), the legislative agenda in all the common law provinces embraced the idea of "family property" arrangements at marriage breakdown.<sup>28</sup>

With hindsight, the problems are singularly apparent. An initial problem, one which mirrors that of the nineteenth century reforms, is the extent to which the Court's analysis in *Murdoch* represented only incremental, not fundamental, change to existing legal principles. Although the doctrine of constructive trust proposed in the dissenting judgment of Mr. Justice Laskin is usually regarded as an extension of traditional legal principles, it does not challenge fundamental legal ideas about the roles of men and women in marriage. Thus, it was not the marriage *per se* which resulted in Irene Murdoch's entitlement in his view, but rather her extraordinary activities beyond those done by most wives, indeed, activities usually done by men:

A Court with equitable jurisdiction is on solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other, **especially when such labour is not simply housekeeping, which might be said to be merely a reflection**

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27. See Law Reform Commission of Canada, *supra* note 2, Research Papers at 3. The study paper explored the problems of property rights on marriage breakdown and identified four problems with the legal principles in the *Murdoch* case. One of the problems (discussed *ibid.*, Research Papers at 271) was the lack of congruence between the legal principles and "the attitudes, desires and expectations of a substantial majority of Canadians . . . ; [the legal principles were] out of step with contemporary views of marriage." In reaching this conclusion, the report quoted (*ibid.*) from a Canada-wide Gallup Poll on the question: "Where the man has been the chief wage earner in the family, do you think he should or should not have to share equally with his wife any assets accumulated during their marriage, if the two decide to separate?" Out of 1044 persons interviewed, 63 percent responded that the man should have to share with his wife, 23 percent said that it depended on "circumstances" and 10 percent responded that he should not have to share. The study paper concluded that "the present law gives inadequate effect to the 'our property' concept which many couples have at least in regard to some property" (*ibid.*, Research Papers at 272).

28. See *Matrimonial Property Act*, R.S.A. 1980, c. M-9; *Family Relations Act*, R.S.B.C. 1979, c. 121; *Matrimonial Property Act*, S.M. 1978, c. 24, C.C.S.M., c. M-45; *Matrimonial Property Act*, S.N.B. 1980, c. M-1.1; *Matrimonial Property Act*, S.N.S. 1980, c. 9; *Family Law Reform Act*, R.S.O. 1980, c. 152; *Family Law Reform Act*, S.P.E.I. 1978, c. 6; *Matrimonial Property Act*, S.S. 1979, c. M-6.1. See also A. Bissett-Johnson & W. Holland, eds., *Matrimonial Property Law in Canada* (Scarborough, Ont.: Carswell, 1980).

For information on matrimonial property in Quebec during the same period, see J. Pineau & D. Burman, *Effets du Mariage et Régimes Matrimoniaux*, 3d ed. (Montreal: Thémis, 1984).

**of the marriage bonds. . . . The Court is not being asked in this case to declare an interest in the appellant merely because she is a wife and mother. . . .**<sup>29</sup>

In declaring that Irene Murdoch was entitled to share in the property of the marriage, Mr. Justice Laskin was thereby recognizing her extraordinary contribution to the marriage, not her role as a partner to the marriage. Within traditional legal principles, only work which could be performed for money—usually work outside the home—could be regarded as equivalent to a monetary contribution to the acquisition of property. In this way, even the dissenting decision essentially represents continuity within the legal tradition even as it does “justice” in the particular circumstances of the case.

The availability of constructive trust doctrines to create shares in family property for cohabitees has consistently taken account of “extraordinary” work on the part of women making such claims; providing wifely and household services has not generally been regarded as sufficient to invoke the doctrine. In the Supreme Court of Canada’s 1993 decision in *Peter v. Beblow*, however, the majority decision of Madam Justice McLachlin expressed clearly that the idea that “housewife” services were provided by women in cohabiting relationships without expectation of compensation was a “pernicious” idea.<sup>30</sup> In that case, however, the cohabiting woman had worked both inside and outside the home, making a modest financial contribution to the household through part time work as well. Thus, the extent to which this case has really extended the principles about sharing in family property in cohabiting relationships remains somewhat unclear, despite the Court’s strong language criticizing the defendant’s expectations that the woman’s work should not result in compensation but should simply be done for “love.”<sup>31</sup> Clearly, if the entitlement of cohabitees to share in property depends on “outside” work, such a principle does not recognize traditional work done by women in families; only when women do “men’s work” can their contribution be recognized.

By contrast with the position of cohabitees, the entitlement of married couples to share in accumulated family property was defined in terms of contributions to the marriage which have usually been deemed to be equal.<sup>32</sup> In this respect, the work of federal and provincial law reform commissions seems to have influenced the legislative agenda in signifi-

29. *Murdoch*, *supra* note 22 at 451 [emphasis added].

30. *Peter v. Beblow*, [1993] 1 S.C.R. 980.

31. *Ibid.* at 989–90, 993.

32. See, for example, Ontario’s *Family Law Act*, R.S.O. 1990, c. F-3, s. 5(7).

cant ways. Yet, even in this context, the law reform process shows inherent flaws. In the first place, the availability of extensive family property holdings at marriage breakdown, as existed in the *Murdoch* case, probably represents only a minority of divorce cases in Canada. Thus, although Irene Murdoch's financial resources may have been strained, the prospect of sharing in her husband's more extensive property holdings made it feasible to appeal all the way to the highest court. Arguably, the Court's principles (along with the subsequent law reform commission reports) were considerably influenced by the fact situation in *Murdoch* and thus, they paid little heed to the more modest circumstances of many divorcing couples, who may have joint property interests which are much less valuable. Because the parties before the court in *Murdoch* (at least, taking them as a couple) had relatively more resources than average family units in Canada, the Court's law reform efforts may be less useful in families with more modest situations.<sup>33</sup>

Moreover, it is not just that the principles may not be applicable to average families, but also that complementary principles (such as inter-spousal support) may be affected, or that more useful principles for average families may not be developed at all.<sup>34</sup> The erosion of spousal support for women at marriage breakdown after the adoption of legislative principles about property sharing clearly meant that women in families with little or no property at divorce would share equally in property (but one-half of little or nothing is not much) and that they would also be entitled to only limited spousal support. The idea of sharing the property *equally* seemed to obviate the need to consider future needs of spouses, even when they had been out of the workforce for a long time or when they had custody of small children. Indeed, the legislation about family property spawned a considerable amount of litigation about the definition of "property" in the statutes, not because such a philosophical idea has any intrinsic interest but because things such as professional

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33. For a detailed analysis of the average age at divorce, the average length of marriage and some data on financial circumstances, see Mossman & MacLean, *supra* note 3. See also D. McKie, B. Prentice & P. Reed, *Divorce: Law and the Family in Canada* (Ottawa: Statistics Canada, 1983); and Department of Justice, *Evaluation of the Divorce Act: Phase II: Monitoring and Evaluation* (Ottawa: The Department, 1990).

34. The interpretation of principles may also be affected by "extraneous" factors. In Saskatchewan, for example, the courts developed the judicial principle of "capital base theory" to protect the viability of large farm properties in the face of equal sharing principles required by the provincial legislation at divorce. The theory was eliminated by the Supreme Court of Canada in *Farr v. Farr*, [1984] 1 S.C.R. 252. See also J.E. Keet, "The Law Reform Process, Matrimonial Property, and Farm Women: A Case Study of Saskatchewan 1980-1986" (1990) 4 C.J.W.L. 166.

qualifications represented a means of sharing a valuable family "resource" which was otherwise not available for distribution.<sup>35</sup>

In this context, the work of law reform commissions in Canada seems to have been limited to a policy analysis approach, only quite seldom extending to empirical research about the operation of legal principles in practice in relation to divorcing couples. Generally created in the 1960s and 1970s, law reform commissions in common law jurisdictions have been described as filling "the vacuum between the retreat of the creative judiciary and the unresponsiveness of the legislative bodies."<sup>36</sup> Indeed, it was the influential work by the federal Law Reform Commission and by similar provincial commissions in the 1970s that resulted in the provincial legislation about property sharing for married partners at divorce. Unfortunately, follow-up research did not occur, at least in any systematic fashion, in Canada after the enactment of provincial legislation. By contrast, the Australian Institute of Family Studies established a research project to monitor the impact of its family law reform legislation, enacted in 1975; ten years later, the Institute had significant data about the practical impact of legislative principles concerning property and support on divorcing spouses, data which was useful both for assessing the problems and for designing solutions.<sup>37</sup> Especially in the context of the economic impact of property and support principles, such information about the financial well-being of spouses in the years after divorce offers

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35. Many of these cases were litigated in Ontario: see *Corless v. Corless* (1987), 5 R.F.L. (3d) 256 (U.F.C.); *Caratun v. Caratun* (1992), 42 R.F.L. (3d) 113 (Ont. C.A.); *Keast v. Keast* (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.); and *Linton v. Linton* (1990), 30 R.F.L. (3d) 1 (Ont. C.A.). In Nova Scotia, such litigation occurred in the context of defining pensions as property: see *Clarke v. Clarke*, [1990] 2 S.C.R. 795.

36. M. Kirby, "Change and Decay or Change and Renewal" in M. Kirby, ed., *Reform the Law: Essays on the Renewal of the Australian Legal System* (Toronto: Oxford University Press, 1983) 1 at 12. For a more limited view of law reform efforts, see the essays in A. Erh-Soon Tay & E. Kamenka, *Law-Making in Australia* (Melbourne: Edward Arnold, 1980), especially at 24-25:

Legal philosophers naturally spend much of their time looking for or discussing, distinguishing and defining characteristics of law in general. They seek a concept of justice, of law, of a legal system, they speak of *the* nature and *the* function of law. It is easy, in such a context, to ignore or pass over lightly the competing and conflicting demands made on law, the tensions *within* a legal system, the variety of functions it serves, the contraries it embodies, the extent to which its working depends on a wider social, moral, political and economic context. Lawyers can do their work effectively only by knowing their limitations, by not constantly seeking to govern the whole range of human actions or pandering to the false view so widespread today—the view that, if there is a social inequity, a social problem, a personal unhappiness, there must be a law which it is not beyond the wits of man [*sic*] to devise that would fix it.

37. See *Settling Up*, *supra* note 10.

an indispensable guide to needed changes. Clearly, and just as importantly, they show the limits of law reform initiatives which assume the existence of property when there is likely to be none.

Thus, the family law reform process relating to property principles suggests that resistance to fundamental change is inherent in the process itself. For this reason, most changes are incremental at best, building on existing legal principles without challenging their underlying assumptions, and thereby reinforcing current patterns of entitlements. In the family law reform process, moreover, this problem is exacerbated by assumptions, derived from those cases litigated by relatively more wealthy family units, that most divorcing partners have significant property for equal sharing; by contrast, if most divorces involve family units with little or no property (especially after payment of legal fees), such a principle has no practical utility. In this context, moreover, law reform commissions in Canada have not undertaken much empirical research which might challenge these accepted views about the availability of property for sharing. Thus, the potential for law reform commissions to challenge current legal principles has been seriously eroded.

## 2. *The significance of equality jurisprudence in the context of family law reform*

In the past two decades, family law reform in Canada and in other common law jurisdictions has occurred in a political context in which gender equality has been an increasingly contested issue, although there has been little agreement about the content of the equality objective and even less about the strategies for achieving it. For example, when Lenore Weitzman documented the inequitable results for women in the context of California's no-fault divorce law in the 1970s, she nonetheless concluded that the equality goals of the legislation were satisfactory and that the problem was that "the means used to achieve them were not in all ways appropriate."<sup>38</sup> In the context of this conclusion, she recommended additional law reforms to achieve "fairness, equity and equality" in the

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38. Weitzman, *supra* note 3 at 401.



legal process, asserting that the process of law reform is one of "continuous correction and refinement."<sup>39</sup>

By contrast with Weitzman's positive view of the potential for law reform to address equality issues in families, others have expressed much less confidence in the utility of equality ideas to achieve substantive family law reforms. Isabel Marcus's assessment of New York divorce reforms in the nineteenth and twentieth centuries led her to conclude that both reform processes reflected the social construction of gender roles and failed to achieve real gender equality; as she asserted, "gender free or even gender neutral divorce law in a gendered society is an oxymoron."<sup>40</sup> Similarly, Martha Fineman's detailed analysis of the divorce law reform process in Wisconsin in the late 1970s clearly identified the ways in which reformers' adoption of formal equality goals impeded their ability to accomplish reforms which would ameliorate the dire economic circumstances of many women at divorce;<sup>41</sup> in this way, the reform process accomplished goals which were more symbolic than real. In her more recent work, moreover, Fineman has extended her analysis of the negative impact of equality ideas to other areas of family law reform, suggesting that equality rhetoric has impeded the goals of substantive gains for women at marriage breakdown:

During the past several decades, as in many areas, "equality" has become the normative standard in family law for reform. . . . I criticize [such] divorce reform efforts . . . because I believe they have had a detrimental impact on many women and children. Developments in this area illustrate that reformers can and often do create new, even more complex difficulties through the ill-considered strategies they seem inevitably to employ when using the law to attempt to construct a more ideal society. The rhetoric [of equality] defines, and confines, the reform.<sup>42</sup>

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39. *Ibid.* On the basis of the problems identified by her study of existing legal arrangements, she proposed a number of changes to ameliorate the most serious problems of injustice: the need for better child support arrangements, the need to amend the law's expectations of "long-married, older housewives," the need to accommodate mothers with custody of children, and the need for appropriate legal measures to take account of the complex needs of middle-aged divorcing women (those with some experience in the workforce but for whom their families' need had always taken priority over career development). For critiques of Weitzman, see M. Fineman, "Illusive Equality: On Weitzman's *Divorce Revolution*" [1986] A.B.A. Research J. 781; and Mossman, Book Review of *The Divorce Revolution* by L. Weitzman, *supra* note 9.

40. I. Marcus, "Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York" (1987-88) 42 U. Miami L. Rev. 55.

41. M. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce" [1983] Wis. L. Rev. 789.

42. M. Fineman, *The Illusion of Equality* (Chicago: University of Chicago Press, 1991) at 2.

Thus, in the context of American family law reform, Fineman's view is that equality goals have not only failed to achieve substantive equality, but they have even contributed in some circumstances to worsening economic conditions for women and children.

The idea of equality has been significant in family law reform in Canada also. *Murdoch* was litigated in the Supreme Court of Canada only a few years before the claims of Jeannette Lavell and Irene Bedard concerning the interpretation of section 12(1)(b) of the *Indian Act*. Interestingly, both claims related to entitlement to property interests which flowed from Indian status under the *Act*, although the property aspects of their claims were not significant in the arguments about the interpretation of the *Canadian Bill of Rights*.<sup>43</sup> The equality idea was also very evident in the work of law reform commissions responding to the *Murdoch* case. As the federal Law Reform Commission report stated:

The need for some fundamental reorganization of the existing property laws . . . regulating the rights and obligations of family members was underlined in the recent decision . . . in [*Murdoch*]. The public reaction to that decision clearly indicates that the existing laws discriminate to the prejudice of the married woman and are no longer acceptable in contemporary society. A property regime must be devised that will promote equality of the sexes before the law.<sup>44</sup>

In the provincial legislation enacted in response to *Murdoch* between 1978 and 1980, the equality principle was central to determinations about spousal entitlement to share in family property. The "second wave" legislation enacted in Ontario in 1986 also clearly provided that the purpose of the property sections of the *Act* was to recognize that:

child care, household management and financial provision are the joint responsibilities of the spouses and **that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, . . .**<sup>45</sup>

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43. See *A.G. Canada v. Lavell; Isaac v. Bedard*, [1974] S.C.R. 1349.

44. Law Reform Commission of Canada, *supra* note 2, Research Papers at 3. The study paper identified four problems with the legal principles evident in the *Murdoch* case: one was the lack of congruence between the legal principles and "the attitudes, desires and expectations of a substantial majority of Canadians" (*supra* note 27). The report also adopted equality language, concluding (*ibid.*, Working Paper at 41) that each partner should be entitled to "an equal participation in the financial gains of [the] marriage": "We associate ourselves with the concept of equality before the law for married persons of both sexes and believe that it is the coherence and justice inherent in the concept of equality that gives the true substance to the argument that there is a need for significant change in the law governing family property relations" (*ibid.*, Working Paper at 3). See also Law Reform Commission of Ontario, *Report on Family Law, Part IV: Family Property Law* (Ottawa: Ministry of the Attorney General, 1974) at 49ff.

45. *Family Law Act*, R.S.O. 1990, c. F-3, s. 5(7) [emphasis added].

By contrast with the property provisions of this legislation, however, entitlement to inter-spousal support has generally been defined by the statutes so that a dependent spouse must demonstrate both financial need and also the availability of financial resources on the part of the paying spouse. Because these statutory provisions have been interpreted in the context of a concept of financial self-sufficiency for former spouses, inter-spousal support has diminished on the assumption that husbands and wives are equally able to be self-supporting at divorce. Thus, even though the concept of equality is not so apparent in the context of inter-spousal support, by contrast with property entitlement, the idea of equality has nonetheless been a significant factor in determining entitlement to spousal support.

The use of equality ideas for determining entitlement to support were most evident in the Supreme Court of Canada's "trilogy" of decisions in 1987. In *Pelech*, *Richardson* and *Caron*,<sup>46</sup> the court considered applications to vary spousal support where the former wives were in need after signing support agreements which, for various reasons (including illness and the inability to find work), had proven inadequate to meet their financial needs some time later. In carefully considered reasons, Madam Justice Wilson declined to order variation in all three cases on the basis that none of the applicants had shown that there had been a "radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage."<sup>47</sup> Thus, the former wives and

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46. *Pelech v. Pelech*, [1987] 1 S.C.R. 801 [hereinafter *Pelech*]; *Richardson v. Richardson*, [1987] 1 S.C.R. 857 [hereinafter *Richardson*]; and *Caron v. Caron*, [1987] 1 S.C.R. 892 [hereinafter *Caron*]. For a discussion of the cases concerning causal connection after the trilogy, see C.J. Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8 Can. J. Fam. L. 95.

47. See *Pelech*, *supra* note 46 at 851. As Madam Justice Wilson explained, such a principle ensures that parties will be free to make their own agreements and create a "clean break":

Absent some causal connection between the changed circumstances and the marriage, it seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other. It is only, in my view, where the future misfortune has its genesis in the fact of the marriage that the court should be able to override the settlement of their affairs made by the parties themselves.

In *Richardson*, Mr. Justice La Forest dissented from the application of the *Pelech* principle to the facts in *Richardson*, including the fact that Mrs. Richardson had been out of the workforce to care for her children for several years and that she had also worked part time rather than full time during some years of the marriage. In this way, Mr. Justice La Forest argued that her dependency was connected to the marriage relationship, a view not shared by Madam Justice Wilson for the majority.

husbands were regarded as equally able to be financially self-sufficient after marriage breakdown. As Martha Bailey has stated so firmly, however, the "clean break" philosophy of these cases fails to acknowledge the substantive inequality between former wives and husbands:

The clean break philosophy relieves men, who are almost always the payors, from continuing support obligations, and enables them to form (and abandon) new relationships without ongoing financial burdens. Women are disadvantaged by the emphasis on self-sufficiency and a clean break insofar as their true condition of continuing economic inequality is not addressed.<sup>48</sup>

In spite of these criticisms, the equality idea enshrined in the court's standard of self-sufficiency for former spouses at marriage breakdown seems to have diminished the availability of inter-spousal support. The 1990 Department of Justice study<sup>49</sup> of divorce files over five years demonstrated that spousal support was increasingly rarely requested and even more rarely granted, "despite the fact that women reported they earned 69 per cent of men's earnings in 1988, and 64 per cent of men's earnings in 1986."<sup>50</sup> As Carol Rogerson concluded in her study of the awards of spousal support:

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48. M. Bailey, "*Pelech, Caron, and Richardson*" (1989-90) 3 C.J.W.L. 615 at 626. Bailey provides a compelling analysis of the nature of gender inequality in contract bargaining in the family law context, specifically addressing Madam Justice Wilson's concerns that it would be paternalistic and reinforce stereotypical views of women if gender inequality *per se* were held to be a sufficient reason for setting aside a "voluntary" contract. As Bailey suggested (*ibid.* at 629), it would be preferable to take account of

the relative poverty of the wife at the time of execution [of the contract], which is present in virtually every reported decision on domestic contract variation, [and view] contract terms falling below the norm . . . as satisfying the two-fold unconscionability test of inequality and unfairness. . . . This approach would be responsive to the particular circumstances of each case while recognizing systemic gender inequality, would reframe the issue as other than one of the wife's emotional or psychological frailty, and would lay claim to a societal interest in a certain standard of fairness in domestic contracts, while preserving some finality.

See also B. Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28 Osgoode Hall L.J. 303; and D. Majury, "Unconscionability in an Equality Context" (1990-91) 7 Can. Fam. L.Q. 123.

49. See Department of Justice, *supra* note 33.

50. "Women, Kids Driven into Poverty by Low Awards under Divorce Act" *Lawyers' Weekly* (31 August 1990) 1, 23. According to this report, court files examined in the study revealed that "women requested support in only 16 per cent of the applications, and were awarded support in only 6 per cent of all cases in 1988." Those who did not ask for support explained that:

- they felt self-sufficient (54 percent)
- they didn't need it (9 percent)
- they didn't believe in it (10 percent)
- they wanted a "clean break" (14 percent)

often the amounts of support awarded provide at best a very modest income, given the absence of other substantial sources of income, and in almost all cases the final income position of former wives is significantly lower than that of their former husbands.<sup>51</sup>

Rogerson also found "a disturbing pattern of contracts negotiated by lawyers which [were] less favourable to women than what the client could have obtained in court," suggesting that lawyers had assumed a model of inter-spousal support in which self-sufficiency was even more important than in the statutes and judicial decisions.

Thus, in the family law reform context, it seems clear that the equality concept adopted is one of formal, not substantive equality. The idea of formal equality treats husbands and wives as similarly situated with respect to financial self-sufficiency at marriage breakdown, and does not take account of actual differences in employability (because of years out of the workforce for child care responsibilities), differences in earning capacity (especially where skills may have atrophied by time out of the paid workforce), or future problems of balancing child-raising with full time employment (especially for wives who have more frequent custody of children). Moreover, it is striking that the Supreme Court of Canada adopted a concept of formal equality for spouses at marriage breakdown in the trilogy only two years before its major equality decision in *Andrews v. The Law Society of British Columbia*,<sup>52</sup> a 1989 decision that recognized the limits of the "similarly situated" test and incorporated the idea of comparative "disadvantage" into the idea of equality. As Lynn Smith has argued, the *Andrews* decision represented a significant departure for Canadian equality jurisprudence and the opportunity for disadvantaged groups, including women, to use the *Charter* to accomplish real reform.<sup>53</sup>

Yet, while it is possible to argue that women's claims to substantive equality have sometimes achieved success in the courts, especially after the *Andrews* decision, it is more difficult to make such assertions in the family law context, even though most of the provincial statutes incorporate equality standards, at least in relation to property entitlements. Indeed, part of the problem in obtaining spousal support for dependent wives seems to be directly connected to the statutory entitlement to share equally in property. According to this approach, once the accumulated family property has been shared equally between the spouses, they are to be regarded as individuals who should be (or shortly become) self-

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51. See *ibid.* See also Rogerson, *supra* note 46.

52. [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

53. C.L. Smith, "Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992) 55 *Law & Contemp. Probs.* 211.

sufficient. In this way, family law reform has created new entitlements to share in property, but with the corollary of reduced or non-existent entitlement to ongoing financial support. As was argued earlier, however, the fact that many divorcing couples have little or no property to divide (as was clearly the case in *Richardson*) means that dependent wives may receive no property and also fail in their claims for spousal support.

As well, there have been suggestions that family law cases present difficulties for equality analysis because they are "highly fact-based and involve the exercise of judicial discretion."<sup>54</sup> While these concerns are real ones, there are other more significant reasons which, in my view, explain the difficulty of using equality analysis in the family law context. In spite of the Supreme Court's test of comparative disadvantage in the *Andrews* case, it is arguable that the Court must still use a basic comparator in the application of principles, and that the hidden comparator is a male standard. In this way, it may be easier to use equality analysis in contexts where women are engaged in activities which are most like those generally undertaken by men; such an analysis explains why the Court has used equality analysis more successfully in cases involving women in the workplace: systemic discrimination in relation to non-traditional work,<sup>55</sup> sexual harassment,<sup>56</sup> and arrangements for pregnancy leave.<sup>57</sup> By contrast, equality analysis in the family law context requires us to examine the underlying assumptions about the roles of husbands and wives (and fathers and mothers) in families. In the context of family life, where decisions are so often made to enhance the well-being of the family unit as a whole, the task of applying equality analysis is a difficult one because it depends on a sense of individualism and liberty which does not take account of family ties.<sup>58</sup> Moreover, the juxtaposition of equality analysis at marriage breakdown cannot achieve its goals when members of the family unit have behaved as part of a unit during the marriage, often making decisions then which work to their detriment at marriage breakdown.<sup>59</sup>

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54. K. Busby, L. Fainstein & H. Penner, eds., *Equality Issues in Family Law: Considerations for Test Case Litigation* (Winnipeg: Legal Research Institute of the University of Manitoba, 1990) at 3. As the authors noted, however, "one third of the inquiries received by LEAF's national office concern cases raising family law issues."

55. *Action Travail des Femmes v. C.N.R.*, [1987] 1 S.C.R. 1114.

56. *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 2152.

57. *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321 (S.C.C.).

58. For further analysis of this idea, see M.J. Mossman, "Individualism and Community: Family as a Mediating Concept" in A. Hutchinson & L. Green, eds., *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1988) 205.

59. See J.L. Knetsch, "Some Economic Implications of Matrimonial Property Rules" (1984) 34 U.T.L.J. 263.

A good illustration of the complexity of using equality analysis in the family law context is the Supreme Court of Canada's recent decision in *Moge v. Moge*.<sup>60</sup> The trial court determined that the wife had been responsible (during about 20 years of marriage) for most of the household work and had also worked part time in the evenings as a cleaner (about 6 hours per evening), while the husband worked as a welder but, in spite of his claims to the contrary, did not contribute to the household responsibilities. From the time of separation in 1973, the husband paid about \$150. per month in spousal support, in addition to child support. He eventually applied to terminate his obligation for spousal support in 1989, arguing that his former wife should have become self-sufficient or that there was no causal connection between her dependency and the marriage, pursuant to the test established in the trilogy. The Supreme Court of Canada reviewed the requirements of the recent divorce legislation and much of the literature on the feminization of poverty as well as the jurisprudence, and concluded that her former husband should continue to pay spousal support to Mrs. Moge in the amount of \$150. As Madam Justice L'Heureux-Dubé stated:

the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice. . . . While quantification will remain difficult and fact related in each particular case, judicial notice should be taken of such studies. . . .<sup>61</sup>

The case represents an important contribution in terms of the recognition of spousal inequality at marriage breakdown. At the time of the Supreme Court decision, Mrs. Moge was living under some hardship while Mr. Moge had a new (working) partner and they owned a home; his income was about \$2000 per month. In spite of this outcome, however, the case may not represent a significant reform to family law. In the first place, the payment of spousal support in the amount of \$150 is unlikely to alleviate Mrs. Moge's hardship to any significant degree. More importantly, however, the Supreme Court's decision expressly confined

60. [1992] 3 S.C.R. 813 [hereinafter *Moge*].

61. *Ibid.* at 873-74. Justice L'Heureux-Dubé also referred to her earlier comments:

Before considering this evidence, . . . I feel that a judge should not close his (or her) eyes to the daily realities of present-day life. . . . The outcome of a family law proceeding is . . . more dramatic [than cases about contract, insurance or tort]. Lack of income is felt daily, and may affect the children's entire lives, aside from often working to the detriment of the person who, though with adequate resources, deprives his family of what they need. This, in my view, had to be said since such deficiencies are so often encountered in the entering of evidence in family law cases.

See also *Droit de la famille*—182, [1985] C.A. 92 at 95 (*per* L'Heureux-Dubé J.).

its application to cases which did not involve negotiated contracts between the parties, leaving "for another day" the more general question of the efficacy of the trilogy principles in the context of cases involving a final settlement. Moreover, since the trilogy focused on the interpretation of the former *Divorce Act*, the Court clearly had an opportunity to overrule the trilogy by interpreting the more recent legislation in a way which promoted substantive equality between former spouses. Instead, the Court chose to differentiate former wives without separation agreements, to whom the *Moge* principles are applicable, from those who enter into "freely-negotiated" final settlements, to whom the trilogy principles apply.

Such a result, once again, demonstrates the incremental nature of reform in the family law context; even when the Supreme Court of Canada, using a substantive equality approach, focused directly on the post-divorce problems of economic insecurity for women (and children), its conclusion made an incremental, not fundamental, change. In my view, part of the explanation for the limited usefulness of equality analysis in reforming family law is the traditional (sometimes invisible) division between the public and private spheres. Moreover, because economic dependency in families also raises important questions about responsibilities for those who are economically dependent, it is important to consider this theme in relation to family law reform processes as well. As Pamela Symes has argued, any new theory about family law must take account of "changing attitudes and perceptions . . . of dependence,"<sup>62</sup> a view which necessarily requires us to (re)examine the law's division between public and private.

### 3. *The impact of the public/private division and family law reform*

The law reform process concerning property and inter-spousal support at marriage breakdown suggests that the traditional dichotomy between public and private remains an important feature for family law and policy. Thus, some recent court decisions (such as the trilogy concerning inter-spousal support) can be regarded as "consistent with the global trend toward privatization" and "protection of the private sphere of the family

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62. P. Symes, "Property, Power and Dependence: Critical Family Law" (1987) 14 J.L. & Soc'y 199 at 200.



from state intervention.”<sup>63</sup> Such an approach has been characterized by Katherine O’Donovan as the standard liberal view that “intervention by the state in family life is to be avoided if at all possible.”<sup>64</sup>

Yet this traditional view of law’s non-intervention in private life has also been challenged forcefully. Thus, there have been criticisms that the public/private dichotomy is more legal fiction than reality, and that the boundaries between public and private are either mutable or illusory (or perhaps both).<sup>65</sup> Moreover, it is clear that public action is always involved in defining boundaries which are considered private, so that, as Margaret Thornton has suggested, “legislative and administrative activity [is always] involved in constituting the private sphere in the character of the family.”<sup>66</sup> Recognizing the law’s role in constituting the public/private dichotomy is thus regarded by critics like Nikolas Rose as the first step in achieving fundamental family law reform:

The very notion of family privacy thus mystifies the extent to which the family is constructed and controlled by the state and its agencies, and obscures the power differences and conflicts amongst family members. Reform proposals which operate in terms of the public/private divide, or which seek to increase an unproblematical family privacy, are thus fundamentally flawed.<sup>67</sup>

Feminist criticisms of the public/private dichotomy have also focused on its parallels with other legal dichotomies, including that of male/female, and have demonstrated the ways in which current social arrangements are

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63. Bailey, *supra* note 48 at 616. As Bailey has argued, the ideas of formal equality and the privatized family intersect to protect family decision-making from legal intervention: “The privatized family, long exposed by feminists as a state-sanctioned arena for male abuse of power, will not produce agreements consistent with the standards of fairness embodied in our family laws because of the inequality of bargaining power between men and women.”

64. K. O’Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985) at 14.

65. For an excellent analysis of these issues, see F.E. Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” (1983) 96 Harv. L. Rev. 1497. See also F.E. Olsen, “The Myth of State Intervention in the Family” (1985) 18 U. Mich. J.L. Ref. 835; and “The Politics of Family Law” (1984) 2 Law & Ineq. 1.

66. M. Thornton, “The Public/Private Dichotomy: Gendered and Discriminatory” (1991) 18 J.L. & Soc’y 448 at 449. See also J. Fudge, “The Public/Private Distinction: The Possibilities of and Limitations to the Use of Charter Litigation to Further Feminist Struggles” (1987) 25 Osgoode Hall L.J. 485.

67. N. Rose, “Beyond the Public/Private Division: Power and the Family” (1987) 14 J.L. & Soc’y 61.

supported by the maintenance of such (unequal) dichotomies.<sup>68</sup> Such criticism has also exposed the ways in which the process of defining the public/private boundary operates to mask choices about legal intervention or non-intervention, choices which are not neutral, but normative.<sup>69</sup> At the same time, some ambivalence about law's role is revealed in feminist research which has documented the sometimes beneficial role of state intervention in families for women.<sup>70</sup> At the same time, however, others like Jane Ursel have documented legal intervention in women's lives (in the workplace and in the family) and suggested that it is frequently contradictory and ambivalent in relation to reforms advocated by women:

The double-edged sword of state intervention is located in its mandate to mediate the contradiction between the demands of production and the requirements of reproduction. This mandate implicates the state in complex and contradictory dynamics that contain the dual possibilities of progress . . . and exploitation. . . . In the context of these dual possibilities, the state is a contested terrain. I understand the women's movement . . . as a radical departure . . . in its refusal to tolerate 'reforms' constructed at the expense of women, for example, the support-service marriage 'solution' of the past.<sup>71</sup>

Such critiques of the public/private dichotomy offer a useful approach to assessing family law reforms concerning property and inter-spousal support. Indeed, these reforms might be characterized as "public" policies which try to ensure that the primary responsibility for dependent family members remains the "private" responsibility of the family, after marriage breakdown just as during the marriage. In such a context, the provisions concerning property entitlement, for example, try to divide

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68. Thornton, *supra* note 66 at 466. After considering issues of domestic violence, rape and sexual harassment, Thornton argued (*ibid.*) that the existence of the public/private dichotomy made the law more impervious to reform:

The central legitimating and ideological role played by law within the liberal state ensures that it maintains the hegemony of masculinity through the seeming naturalness of the public/private, male/female, mind/body dichotomies. The harms women suffer by virtue of their sex/sexuality are so embedded within the private sphere *qua* family *qua* corporeality that they have not been tractable to effective reform.

69. C. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 *Signs* 515; and "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635.

70. See, for example, N. Pupo, "Preserving Patriarchy: Women, the Family and the State" in N. Mandell & A. Duffy, eds., *Reconstructing the Canadian Family* (Toronto: Butterworths, 1988) 207 at 211–12. Pupo also expressly referred to the work of F.F. Piven, "Women and the State: Ideology, Power and the Welfare State" (1984) 14:2 *Socialist Rev.* 11.

71. J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 298.

family assets so as to foster some economic equality for both former spouses. According to this analysis, the principles for inter-spousal support can also be seen as encouraging self-sufficiency, with some marginal assistance from former family members in needy cases. Thus, while legal intervention is the means of achieving these objectives of "public" policy, the effect of the reforms is the enforcement of "private" family responsibilities for those who are dependent.

In this context, moreover, the enactment of support enforcement legislation in several Canadian provinces further emphasizes the use of "public" intervention to ensure "private" familial responsibilities. The problem of non-payment of child support has frequently been characterized in terms of recalcitrance on the part of payor spouses, even though there has been little empirical data available.<sup>72</sup> After the initial legislation was enacted in Ontario, however, the administrators enforcing the legislation noted, with some frustration, that the enforcement process often resulted in a long-overdue reconsideration of the circumstances of the parties, concluding sometimes with a reduction in the amounts required to be paid and the elimination of arrears.

In relation to child support especially, there is a need for ongoing monitoring of both the needs of the child(ren) and the resources of the payor spouse. Adjustments are quite typically required. Yet, sometimes for good reasons, the payor spouse may not seek variation but rather simply cease paying child support, pay irregularly or choose to pay less than the amount ordered. And while it seems clear that child support payments have increased substantially with enforcement legislation, the measures for implementing these obligations have become increasingly elaborate. The process is clearly one of public legal intervention in support of the enforcement of private familial obligations. Indeed, the arrangements for enforcing child support now represent the investment of considerable state resources, a matter which clearly factors in the question of whether this is private or public action.

According to this analysis, the idea of family law reform as legal intervention in the private sphere seems less compelling since it is clear that the state may define not only the form of intervention but also the boundaries between public and private. Indeed, it may be important to question whether the definition of the boundary between public and private may itself be preventing the adoption of initiatives which can achieve more fundamental family law reform. If the problems of post-

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72. For some examples, see Canadian Institute for Research, *Matrimonial Support Failures: Reasons, Profiles, and Perceptions of Individuals Involved* (Edmonton: The Institute, 1981); and F.M. Steel, "Maintenance Enforcement in Canada" (1985) 17 Ottawa L.R. 491.

divorce economic security (especially for women and children) were (re)conceptualized as public responsibilities, rather than obligations which are private and familial, would it promote fundamental family law reforms rather than merely incremental ones? Put a different way, if the family were regarded as a "public" institution within society rather than a private one, at least in relation to issues of economic security at marriage breakdown, would law reform solutions be more likely to address the structural and institutional features of marriage breakdown in ways which might better address the tragic statistics concerning women and children impoverished by the divorce process?

Acknowledging the public role of the family in providing economic security for dependent family members, both during a marriage as well as after marriage breakdown, would necessitate some recognition that dependency is, after all, a fact of life for most of us. As children, we were all dependent and many of us will again be dependent in old age, or because we are unable to work, either through infirmity or perhaps because global restructuring of the economy means that there are fewer jobs that ensure economic independence. Canadian public policy has traditionally used legal intervention to ameliorate dependency caused by age, infirmity or loss of employment, even though there may be familial resources in some of these cases which are also available to support dependents. Thus, it is interesting to speculate whether and how public policy measures might also support legal intervention at marriage breakdown to assure dependent women and children a basic level of economic well-being. Such arrangements have been recommended in the United Kingdom<sup>73</sup> and have been partially implemented in Australia where reforms relating to the enforcement of child support have been integrated into the income tax system.<sup>74</sup>

Thus, (re)conceptualizing family law reform as a matter of public policy rather than the enforcement of private familial obligations permits us to ask different questions about the goals of family law reform efforts. It also overcomes the problem of the public/private dichotomy that has been used in the past to limit the extent of intervention in ways which have

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73. See Justice B. Wilson, "The Variation of Support Orders" in R. Abella & C. L'Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983) about the *Report of the Committee on One Parent Families* (the Finer Committee). See also M.J. Mossman, "Family Law and Social Welfare in Canada" in I. Bernier & A. LaJoie, eds., *Family Law and Social Welfare Legislation in Canada* (Toronto: University of Toronto Press, 1986) 43.

74. See M. Harrison et al., *Paying for the Children: Parent and Employer Experience of Stage One of Australia's Child Support Scheme* (Melbourne: Australian Institute of Family Studies, 1991).

placed women and children at an economic disadvantage after marriage breakdown. A recognition that no-fault divorce permits some married persons to exit from existing relationships and form new ones (men, more often than women and children) means that we need structural and institutional arrangements which ensure the economic well-being of dependent family members after marriage breakdown. In this way, it is necessary to challenge the myth of the family as a private sphere, along with the use of formal equality concepts and the inherent limits of family law reform, to achieve fundamental reform, reform which can assure economic security for dependents on marriage breakdown and thus confront poverty statistics arising out of divorce in a more meaningful way.

### III. *Toward Fundamental Family Law Reform*

The paradox of family law reform—that there has been so much activity on the part of legislators, courts, law reform commissions and other interested groups, but that economic security remains a problem for so many dependent women and children after marriage breakdown—is not easily addressed. Women and children are still “running hard to stand still.”<sup>75</sup> In spite of all the reform activity in the past two decades, the resolution of post-divorce economic relationships has not been accomplished successfully. Thus, in thinking about the underlying themes of family law reform (the inherent limits of law reform activity within the legal system, problems of formal equality in the family law context, and the myth of the division between public and private spheres) it is important to confront the fact that family law in Canada has never been understood as a problem about justice.

The recent report of the CBA Task Force on Gender Equality in the Legal Profession documented the difficulties experienced by all those involved in the administration of family law matters. The report explained that members of the Task Force had become interested in problems in the family law area because of the frequency with which such concerns were raised by lawyers, law teachers and judges who were interviewed in the course of its inquiry. The Task Force concluded that it was important to address these concerns as a means of assessing the implementation of public policy about families in the administration of justice in Canada. As the Task Force stated the issue:

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75. For a recent account of other problems of women in the family law system, see *Family Violence = Family Law Violence* (Toronto: Mothers on Trial, 1993).

Canadian governments state that they value children highly; Canadian lawmakers legislate widely to protect children, to provide for the support of single parents, and to regulate the division of family assets upon marriage breakdown; family legal aid schemes have been established to enable those who have been financially disadvantaged by their commitment to family and children to have access to the rights guaranteed in our legislation. Are these endeavours backed up by practical commitments? Are the lofty phrases of our legislators reflected in the concrete experiences of our family lawyers and litigants?<sup>76</sup>

The Task Force answered these questions in the negative:

In reviewing the evidence about the practice of family law in Canada, the Task Force found that the reality fell far short of our aspirations and our ideals. Lawyers struggling to provide justice to litigants in this area received little support despite verbal assurances from many levels of government. In the cynical words of one female lawyer, governments provide "all possible aid short of actual help."<sup>77</sup>

As the Task Force further documented the problems, moreover, the inescapable conclusion was that families, family relationships and individuals' well-being as family members were not a high priority for governments, a situation reflected in the difficult context of the practice of family law for lawyers and judges, as well as for clients and litigants.

In such a context, there is a further reason to (re)think family law reform in terms of fundamental, not incremental, change, in terms of substantive equality goals rather than formal equality objectives, and in the context of public policy about post-divorce economic security rather than the privatization of responsibility for dependent family members. Such an approach takes seriously Susan Moller Okin's assertion that "the family . . . must be just if we are to have a just society."<sup>78</sup> According to Okin, it is in the family where we first learn to have a sense of individual identity in relationship with others, the basis for **both** independence and connection, ethical ideas which are essential in a just society. In this way, family "conversations" represent the seeds of public and constitutional discourse; according to Okin, unless our families are just, there is little possibility for public discourse which both embraces our similarities and respects our differences.<sup>79</sup>

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76. Canadian Bar Association, *Task Force on Gender Equality in the Legal Profession, Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 203.

77. *Ibid.*

78. S. Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989) at 14.

79. For further discussion of the relationship between "family conversations" and constitutional discourse, see M.J. Mossman, "The Family in the Work of Madame Justice Wilson" (1992) 15 *Dalhousie L.J.* 115.

In such a context, we need to use the opportunity for fundamental family law reform to find an imaginative revisioning of ourselves as individual members of families and as members of the Canadian community.